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Supreme Court, U.S.
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No. 07-1569

IN THE
Supreme Court of the United States

THE CITY OF GARDEN GROVE,
Petitioner,

v.

THE SUPERIOR COURT OF ORANGE COUNTY
and FELIX KHA,
Respondents.

On Petition for a Writ of Certiorari to the
California Court of Appeal, Fourth Appellate District,
Division Three

RESPONDENT KHA'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

As discussed below, petitioner's lack of Article III standing prevents this Court from reaching the merits.

Regarding the merits, the question presented is:

After municipal police officers have seized medical marijuana lawfully possessed under state law pursuant to a physician's recommendation, is a state court's order requiring return of the property to its lawful owner preempted by the federal Controlled Substances Act, which (1) makes possession of marijuana a federal crime, (2) expressly preserves state criminal law enforcement authority with regard to controlled substances unless state and federal law "cannot consistently stand together," and (3) immunizes state and local law enforcement officers from any civil or criminal liability when engaged in enforcing "any state or municipal law relating to controlled substances"?

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STATEMENT OF THE CASE

Introduction

The City of Garden Grove, California (the City) has petitioned this Court to review a decision of one of the California Courts of Appeal. Even leaving aside petitioner's lack of Article III standing discussed below, the City's petition meets none of the criteria for the grant of certiorari described in this Court's Rule 10, and thus the petition should be denied.

Far from creating a division of authority among state high courts or between state high courts and the federal courts of appeal, the decision below creates no tension with any appellate decision at any level of the state or federal judiciary. Indeed, only one appellate court has considered an issue similar to the one resolved in this case, and, there, an intermediate court in Oregon took the same view as did the Court of Appeal below. *See State v. Kama*, 39 P.3d 866 (Or. Ct. App. 2002). And, far from presenting an "important federal question" that calls out for this Court's resolution, S. Ct. Rule 10, the issue presented here has, as indicated, been the subject of only two reported decisions in the history of American jurisprudence and, for reasons explained further below, will rarely, if ever, arise in the future.

Finally, the decision below was correct. The California appellate court properly held that the trial court's decision ordering the return of respondent Felix Kha's medical marijuana, which he lawfully possessed under California law, is not preempted by federal law, which expressly states Congress's intent not to occupy the field of drug law enforcement.

The foregoing reasons are more than sufficient to warrant denial of the petition. In addition, however, the petition masks the City's lack of Article III standing to pursue this case in this Court. Although the California Court of Appeal reached the merits under expansive standing principles applicable in California courts, it correctly acknowledged that the City does not have standing under federal Article III standards because it has not suffered an injury-in-fact that would be redressed by reversal of the trial court's decision.

Facts and Procedural History

On June 10, 2005, two City police officers stopped respondent Kha for running a red light. Mr. Kha consented to a search of his vehicle, and the officers found a container labeled "Medical Cannabis," holding 8.1 grams, or less than a third of an ounce, of marijuana. Pet. App.4a. Mr. Kha told the officers that he used the marijuana because he suffers from severe pain and presented the officers with what appeared to them to be a legitimate doctor's referral. *Id.* Despite the apparent doctor's recommendation and the small amount of marijuana, the officers seized the marijuana and cited Mr. Kha for unlawfully possessing less than an ounce of marijuana while driving, as well as for running the red light. *Id.* The City never alleged that Mr. Kha was driving under the influence of marijuana.

Mr. Kha pleaded guilty to the traffic violation, but disputed the marijuana possession charge under California's Compassionate Use Act, which authorizes possession of small amounts of marijuana for medical use when recommended by a medical professional. *See* Cal. Health & Safety Code §§ 11362.5–.9. Prior to trial,

Mr. Kha provided the court with a statement from his doctor authorizing him to use marijuana for an undisclosed medical condition. Pet. App. 4a. The prosecutor verified the authorization and dismissed the drug charge, but opposed Mr. Kha's motion for the return of his property. The trial court granted the motion, explaining that because the drug charge had been dismissed and the marijuana was possessed legally, the marijuana had to be returned. *Id.* at 5a.

The City petitioned the California Court of Appeal for a writ of mandamus directing the trial court to vacate the order. The Court of Appeal denied the petition. The court first explained that although the City had not suffered an injury-in-fact under federal-court standing requirements ordinarily applied in California courts, it would hear the case because interested parties "may otherwise find it difficult or impossible to challenge the decision at issue," *id.* at 18a, and because the City would not be able to obtain judicial review "unless it is afforded standing in the proceeding." *Id.* at 19a. On the merits, the Court of Appeal held that federal drug law did not conflict with the trial court's order requiring return of Mr. Kha's property. The court relied on a provision of the federal Controlled Substances Act (CSA) that expresses Congress's intent not to occupy the field of drug regulation and rejects preemption "unless there is a positive conflict" between a specific provision of the CSA and state law such that "the two cannot consistently stand together." 21 U.S.C. § 903. *See* Pet. App. 41a.

The City's petition for review of the Court of Appeal's decision to the Supreme Court of California was denied in a boilerplate one-line order. *Id.* at 62a.

REASONS FOR DENYING THE WRIT

A. The City's Lack of Article III Standing Prevents the Court from Reaching the Question Presented.

The California courts, like other state courts, are free to establish their own rules of standing. But once a case arrives in this Court, Article III standing requirements apply. *See, e.g., Doremus v. Bd. of Educ.*, 342 U.S. 429, 434-35 (1952); *Tileston v. Ullman*, 318 U.S. 44, 46 (1943) (per curiam). This much was acknowledged below. Conceding that "the city may not have standing in the traditional sense of the term," Pet. App. 8a, the Court of Appeal carefully analyzed — and rejected — the City's standing under what it termed "the federal injury in fact test." *Id.* at 9a (citation omitted). The court went on, however, to reach the merits, holding that "public policy considerations dictate that we afford the City standing." *Id.* The court relied on loose state-law principles favoring standing in preemption cases, *id.* at 18 (citing California law), and in cases where a "party may otherwise find it difficult or impossible to challenge the decision at issue." *Id.* (same).

The Court of Appeal's reasoning does not suffice to establish standing in a federal court. As that court recognized, among other requirements, "in order to have Article III standing, a plaintiff must adequately establish ... an injury in fact," that is, "a 'concrete and particularized' invasion of a '*legally protected interest.*'" *Sprint Communications Co., L.P. v. APCC Servs., Inc.*,

128 S. Ct. 2531, 2535 (2008) (emphasis added) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). Here, the City does not seek to vindicate its legally protected interest because neither California law nor federal law provides it any right to resist the return of Mr. Kha's property.

As the courts below held, under California's Compassionate Use Act, Mr. Kha lawfully possessed the small amount of marijuana that City police officers seized from him. Even assuming (incorrectly) that the preemptive force of federal law should have led the trial court to deny Mr. Kha's motion for return of his property, the City had no legally protected interest in that result. The City has no ownership interest in the marijuana, and no California or federal law gives the City legal authority to prevent a citizen such as Mr. Kha from obtaining the return of property previously in his possession. As the Court of Appeal explained, under California law, property seized by police officers as evidence for a contemplated prosecution is seized on behalf of *the court*. See Pet. App. 10a-11a (citing cases). And the CSA — the federal law that the City maintains preempts Mr. Kha's claim to the return of his property — does not, of course, bestow a legally protected interest on the City; the CSA is enforced by the *federal* government.

In the Court of Appeal, the City pinned its standing argument on two purported injuries. First, the City asserted that "legalization of medical marijuana has contributed to a marked increase in violent crime in Garden Grove and other cities throughout the state." Pet. App. 12a. But no one, the City included, has a legally protected interest in the abstract desire, shared

by almost everyone in the country, for crime reduction. *See Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004) (standing doctrine prevents federal courts from "decid[ing] abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions") (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975)). And, as the Court of Appeal pointed out, the City provided no support for its speculation that there is a link between the legalization of medical marijuana and crime in Garden Grove. Pet. App. at 12a (citing *Gonzales v. Raich*, 545 U.S. 1, 63 (2005) (Thomas, J., dissenting) (expressing skepticism regarding assertions that medical marijuana programs undermine efforts to halt illicit drug trafficking)).

In any event, the City's effort to tie California's medical marijuana program in general to increased crime sidesteps the relevant inquiry. The City has not even attempted to make the (impossible) showing that preventing the return of *Mr. Kha's* marijuana would reduce violent crime in Garden Grove. But it is *that* showing that would be necessary to establish Article III standing because, in addition to showing an injury-in-fact, a litigant seeking a federal forum must also demonstrate redressability: that the relief sought would remedy the claimed injury. *See Elk Grove*, 542 U.S. at 12 ("The plaintiff must show that the conduct of which he complains has caused him to suffer an 'injury in fact' that a favorable judgment will redress.").

The City's second claim for standing fares no better. The City says that its police officers might be subject to suit — by whom we are not told — for aiding and abetting a violation of federal drug laws if the officers

were to "return Kha's marijuana to him." Pet. App. 13a. But liability for aiding-and-abetting requires a showing that the defendant "have the specific intent to commit, encourage or facilitate the commission of the offense." *Id.* (citing California and federal authority); *see also Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949) (criminal aiding-and-abetting liability requires defendant to have participated in the illegal venture and desired that it succeed). Here, the City and its officers have no realistic concern that they would be targets of a suit because, in returning Mr. Kha's property, they would be following a court order, not seeking to encourage Mr. Kha (or anyone else) to violate federal law. Pet. App. 14a; *see also id.* at 11a (under California law, the City's role in securing and returning seized property is "plainly ministerial").

In addition, under 21 U.S.C. § 885(d), no state or local law enforcement officer "engaged in the enforcement of any law or municipal ordinance relating to controlled substances" is subject to "civil or criminal liability ... by virtue of" the CSA. Thus, even assuming that the CSA were to preempt the trial court's order here, no City officer could be held liable for carrying out that order. *See* Pet. App. 15a (The CSA "confers immunity on all state and federal law enforcement officers engaged in the enforcement of the ... Act or any state or municipal law relating to controlled substances.") (citation omitted).

In sum, the City would not "be adversely affected if its officers carried out the trial court's order in this case." *Id.* at 16a. The City therefore lacks Article III standing, which prevents this Court from reaching the question presented.

B. Even Putting Aside Petitioner's Lack of Article III Standing, the Court of Appeal's Decision Is Not Worthy of Review.

1. Even if the Court were to look beyond petitioner's lack of Article III standing, this case would not be worthy of review. The California Court of Appeal correctly held that the CSA does not preempt the trial court's order directing the return to Mr. Kha of property that he lawfully possessed under state law. The CSA makes unlawful possession of schedule I substances, including marijuana. 21 U.S.C. §§ 812(c), 844(a). But a state may choose not to criminalize and punish behavior prohibited by federal law. Here, under the Compassionate Use Act, California has chosen not to criminalize the possession of small amounts of marijuana for medical use under limited circumstances.

For present purposes, Mr. Kha does not contest that the federal government could seek to prosecute him under the CSA for possessing marijuana that he lawfully possesses under the Compassionate Use Act. But nowhere does the CSA say that the states must, in effect, criminalize the same behavior. *Cf. Printz v. United States*, 521 U.S. 898, 924 (1997) ("'[E]ven where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts ... .'") (quoting *New York v. United States*, 505 U.S. 144, 166 (1992)).

To the contrary, the CSA leaves a wide berth for the operation of state drug laws and expressly authorizes

states to come to legislative judgments different from those rendered by Congress:

> No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together.

21 U.S.C. § 903.[1] This provision demonstrates that the states need not criminalize, prosecute, or penalize possession of controlled substances in the same manner as Congress has in the CSA.

For instance, California takes a different approach to the forfeiture of real property than does the federal government. Under the CSA, any real property that is used "to commit, or to facilitate the commission of, a violation of [the CSA] punishable by more than one year's imprisonment" is subject to forfeiture to the United States. 21 U.S.C. § 881(a)(7). Under California's criminal drug forfeiture law, however, real property is subject to forfeiture only in limited circumstances and in no case when the property is used as a family residence. *See* Cal. Health & Safety Code § 11470(g).

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[1]The term "this subchapter" as used in 21 U.S.C. § 903 and in other sections of the CSA cited in this brief in opposition refers to subchapter I of chapter 13 of title 21 of the U.S. Code, 21 U.S.C. §§ 801-904, which includes all sections of the CSA relevant here.

No one would suggest that California's legislative decision not to subject certain real property to drug forfeiture is preempted by the CSA, and therefore that California is required, in conjunction with state-law drug prosecutions, to subject real property to forfeiture on the same terms specified in the CSA. That is so because California's legislative judgment not to subject real estate to forfeiture when California prosecutes violations of its drug laws can, in the words of 21 U.S.C. § 903, "consistently stand together" with Congress's decision to subject real estate to forfeiture when the federal government prosecutes its drug laws.

However, under the City's preemption theory — which, in practical effect, demands that California's criminal drug laws mimic the CSA — California would be required to subject real estate to criminal drug forfeiture just as it would have to criminalize *any* possession of marijuana, no matter the amount involved or its use. Thus, as the City would have it, the CSA would "occupy the field in which [it] operates"— exactly the opposite of what the CSA provides in 21 U.S.C. § 903.

The City also asserts that federal law preempts the trial court's order because it would require medical marijuana seized in violation of state law to be returned to its owner, while 21 U.S.C. § 881(a) eliminates all property interests in certain controlled substances (including marijuana), even in the absence of a federal prosecution or forfeiture proceeding. The City's argument misapprehends section 881(a)'s text and purpose.

As one would expect in a provision contained in a statute that defines and punishes *federal* drug crimes, section 881(a) does not purport to define or extinguish *state-law* property interests in the absence of a federal prosecution. Rather, it addresses only forfeiture and, then, only under the CSA — that is, the circumstances under which *federal* drug crime proceeds and property used in the commission of *federal* drug crimes are forfeited to the United States. Section 881(a) lists eleven categories of property "that shall be subject to forfeiture to the United States" under "this subchapter," including "[a]ll controlled substances which have been possessed in violation of this subchapter," *id.* § 881(a)(8), and states that "no property right shall exist in them." *Id.* § 881(a). Thus, under this provision's plain text, no one whose property is subject to forfeiture under the CSA retains a right in that property. This forfeiture provision, which is premised on a violation of the CSA and is enforced solely by the U.S. Attorney General, *see id.* § 881(b), is meant to work in tandem with federal drug prosecutions and does not address, let alone eliminate, state-law property rights in the absence of a federal prosecution.

As noted, section 881(a) allows for the forfeiture of, and eliminates property rights in, a range of property used in the commission of federal drug crimes, including, for instance, vehicles used to "transport" a controlled substance "acquired" in violation of the CSA. *Id.* §§ 881(a)(4), (a)(1). If the City were correct that section 881(a) is triggered, in the absence of a federal prosecution, merely by someone's acquisition of marijuana, Mr. Kha, and all Californians who happen

to have transported their medical marijuana in their cars, would no longer own their cars. To state that proposition is to reject it and to underscore the inapplicability of the CSA's forfeiture provision to this case.

2. For the reasons stated above, the CSA does not preempt the trial court's order requiring the return of Mr. Kha's property. But even if the Court of Appeal's preemption ruling were debatable, the issue presented in this case would not be worthy of review. As the City acknowledges, the general question whether a state's medical marijuana law is preempted by the CSA — what the City calls the "question of whether the exemption from state criminal prosecution conflicts with federal law" — "is not relevant in this case." Pet. 17. The "much more narrow" question presented here of "whether interpreting California law to require the return of seized marijuana is preempted by federal law," *id.*, rarely arises and does not warrant this Court's review.

As far as we can tell, the decision below represents only the second time the issue has arisen in a published decision. In the other case, *State v. Kama*, 39 P.3d 866 (Or. Ct. App. 2002), as here, an intermediate court of appeals rejected a city's claim that the CSA preempted a trial court's order requiring the return of a small amount of medical marijuana to its lawful owner under the state's medical marijuana act. *See id.* at 867; *see also id.* at 868 (requiring city to return property under state law did not conflict with federal law, in light of 21 U.S.C. § 885(d), which immunizes from civil and criminal liability officers engaged in state and local drug law enforcement). Thus, no state

court of last resort or federal court of appeals has ever decided the issue presented here, and the scant existing authority unanimously rejects the City's preemption argument — hardly a situation crying out for this Court's intervention.

Moreover, the issue presented here will rarely, if ever, arise in the future. In states with medical marijuana laws, it is unlikely that police officers will seize marijuana lawfully possessed by people who are authorized to use it for medical therapy. Indeed, the California Highway Patrol (CHP), the state's largest law enforcement agency, prohibits its officers from seizing medical marijuana, provided that the patient's medical marijuana identification card or physician's recommendation appear to be valid, and there are no indications of non-medical use. CHP HPM 100.69 ("Controlled Substances Arrests"), at 1-18 (2005). And, earlier this year, the California Attorney General issued guidelines recommending that all law enforcement officials in the state follow the same procedures. Department of Justice, State of California, *Guidelines for the Security and Non-Diversion of Marijuana Grown for Medical Use* 6–7 (2008). Although the City's officers failed to follow such procedures in Mr. Kha's case, there is no reason to believe that state and local law enforcement officers generally will seize small amounts of marijuana that are lawfully possessed under state law, as demonstrated by the dearth of judicial decisions on the topic.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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